PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
ESI	)	
	)	
Complainant,	)	
	)	Proceeding No. 16-407
v.	)	Bureau ID No. EB-16-MD-005
	)	
AT&T, CORP.	)	
	)	
Respondent	)	
	)	

ESI'S REPLY TO AT&T'S ANSWER

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Table of Contents

Summary

In its Answer to ESI's Formal Complaint, AT&T offers five affirmative defenses supported by a Legal Analysis. None of the Affirmative defenses have merit.

AT&T first two affirmative defenses are (1) that ESI's claims are barred because ESI consented to the billing procedures it now challenges and (2) that ESI has failed to state a claim upon which relief can be granted because AT&T has complied with the parties' contract or Master Services Agreement ("MSA"). AT&T relies on the same legal analysis to support both affirmative defenses. The analysis describes AT&T's billing system at length and asserts that the MSA and ESI's voluntary use of the system's options for establishing multiple subaccounts constituted ESI's consent to AT&T actions that led to a violation of the Commission's USF pass-through rule.

AT&T's lengthy discussion of its subaccount system is a classic red herring. The number of subaccounts in ESI's invoices is not the problem which prompted this complaint; AT&T's miscalculation of its USF charge is the problem. Nothing about ESI's use of AT&T's subaccount system or the MSA is relevant to, much less blocks, AT&T's compliance with the Commission's rule requiring it to charge a lawful USF pass-through charge. AT&T erroneously argues that ESI seeks substantial changes to AT&T's billing system as a remedy. But ESI never made such a request. It merely identified several ways that AT&T could properly calculate an accurate USF pass-through charge, none of which would require changes to AT&T's billing systems or invoice formatting.

AT&T's third affirmative defense is that the MSA requires ESI to pursue its claims only via arbitration. The MSA is irrelevant to the complaint, however, because the complaint arises out of and relates solely to AT&T's violation of Section 54.712(a) of the Commission's rules; the MSA's arbitration clause applies only to disputes that arise out of or relate to the MSA. Even if the arbitration clause were applicable, it would not apply because the clause expressly carves out disputes involving the lawfulness of AT&T's rates, terms, conditions, or practices under the Communications Act or the Commission's rules and regulations and expressly permits parties to raise such claims with the Commission.

AT&T's fourth and fifth affirmative defenses are that ESI's claim for damages is limited by the two-year limitations periods specified in the MSA and in Section 415(b) of the Act. But neither of those limitations periods bars any portion of ESI's claim. The MSA does not apply to this dispute because the complaint concerns AT&T's violation of the Commission's rules, not its performance (or lack thereof) under the MSA. The statutory limitations period does not bar any portion of ESI's claim because ESI filed its complaint within two years from the time that the underlying cause of action accrued.

In Parts II.B and IV.B. of its Legal Analysis, AT&T raises two additional defenses.

First, In Section II.B., AT&T argues that it should not be ordered to pay "retroactive money damages" if the FCC determines that AT&T violated the Commission's rules because such a penalty would "work a manifest injustice."

All damages are, by definition, “retroactive” so the backwards-looking nature of money damages is not a valid basis for challenging it. AT&T relies on cases that address the retroactive application of new rules or retroactive liability for new policies adopted in the course of an adjudication, not the calculation of damages based on injuries pre-dating the filing of a claim. Those cases are inapposite to the relief ESI seeks because ESI has not asked the Commission to impose a new rule or requirement upon AT&T in this case and the rule at issue is simple and unambiguous, has been in place for many years, and has provided clear notice to AT&T regarding exactly what is required for compliance. Indeed, the rule sets out a simple mathematical formula for assessing compliance and gives carriers wide latitude regarding the rate levels and rate structures they may use to ensure that their USF pass-through charges satisfy the formula. A Commission finding in ESI’s favor would merely hold AT&T accountable for its violation of an existing rule in the form of a routine damages determination.

Second, Part IV(B) of AT&T’s Legal Analysis seeks a reduction in ESI’s damages because it confuses the charges AT&T uses to *size* the credit in dispute in this case and the charges that AT&T reduces when it *applies* the credit. AT&T’s credit structure uses ESI’s spend on non-telecommunications to qualify ESI for reductions in the charges for it telecommunications services. ESI seeks damages only with regard to the charges it pays to AT&T for telecommunications services.

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ESI'S REPLY TO AT&T'S ANSWER

Pursuant to 47 C.F.R. § 1.726 of the Commission's rules, complainant Express Scripts, Inc. ("ESI"), by its attorneys, submits this Reply to the Answer to ESI's Formal Complaint filed by AT&T Corp. ("AT&T"), and in support thereof states the following:

1. AT&T offers five affirmative defenses to ESI's Complaint and supports them with a Legal Analysis that elaborates on each of the defenses. ESI responds to those defenses and AT&T's supporting arguments in this Reply. AT&T's Legal Analysis also advances two arguments that do not fit cleanly under any single affirmative defense and ESI addresses them separately in the paragraphs below.

I. AT&T's First Affirmative Defense (Contractual Consent) and Second Affirmative Defense (Contract Compliance)

2. AT&T's first affirmative defense is that ESI consented to AT&T's method for invoicing ESI's contract credits and directed AT&T to display the credits on ESI's invoice in a separate subaccount (which AT&T calls a "bill group") from the many

subaccounts in which AT&T records location-by-location charges for ESI's **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** service. AT&T supports this affirmative defense with Parts I.A. and I.B. of its Legal Analysis. AT&T's second affirmative defense is that ESI has failed to state a claim upon which relief can be granted because AT&T has complied with the MSA. AT&T relies on the same parts of its Legal Analysis to support this second defense. Accordingly, this section of ESI's Reply will address both defenses and their common rationale.

3. In Parts I and II of its Legal Analysis, AT&T describes at length the subaccount structure of its invoices. AT&T argues that it did not violate the Commission's USF pass-through charge rule or the Communications Act when it failed to take ESI's credits into account and set its USF pass-through charge too high, because the parties' Master Services Agreement ("MSA")[1] required AT&T to assign ESI's credits to a single subaccount/bill group[2] and ESI chose a subaccount with no other charges that could offset the credits.[3] According to AT&T, its use of multiple subaccounts complies with the USF pass-through charge rule because the rule does not state that multiple subaccounts are prohibited.[4] Moreover, ESI could have asked AT&T to combine all of its charges together with the credit in a single account on its invoice, in which case ESI's credit "would have been placed on a bill with interstate telecommunications charges" and the charges would have been reduced by the credit

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1 Specifically, AT&T refers to the **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** Pricing Schedule in the parties' Master Services Agreement ("MSA").

2 Legal Analysis at 11-17.

3 Legal Analysis at 13

4 Legal Analysis at 13 and 16.

before AT&T calculated its USF pass-through charge.[5] Because ESI chose instead to isolate the credit in a separate subaccount from other subaccounts, ESI cannot be heard to complain of a "dilemma of its own making."[6]

4. AT&T's lengthy discussion of its subaccount system is a classic red herring. The number of subaccounts on ESI's invoices is not the problem which prompted this complaint; AT&T's miscalculation of its USF charge is the problem. Nothing about AT&T's subaccount system or ESI's decision to park its credits in a separate subaccount stands in the way of AT&T calculating a lawful USF pass-through charge in compliance with the Commission's rule.

5. AT&T designed its billing system to allow customers to use subaccounts/bill groups to sort charges by location or budget centers or other organizational units useful to an enterprise customer. When AT&T asked ESI how it wanted to post its credits on its bill, ESI requested that AT&T post the credit to its own subaccount/bill group. Neither AT&T's subaccount system nor ESI's separate subaccount for credits prevented AT&T from including the contract credits to compute the actual "interstate telecommunications portion," as Section 54.712(a) refers to it, of ESI's bill as part of calculating a USF pass-through charge. Applying the contract credits to reduce ESI's charges is what the MSA requires, what the FCC rule provides, and what AT&T does in the master account's Summary of Accounts section where it combines all subaccount charges to arrive at the total amount due from a customer.[7]

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[5] Legal Analysis at 13.

[6] Legal Analysis at 14.

[7] *See* Julie Gardner's declaration accompanying ESI's Formal Complaint ("Gardner Declaration") at ¶¶9 and 18.

But AT&T failed to reflect those same, post-credit charges in its calculation of its USF pass-through charge. Nor did it make any adjustments to the USF pass-through charge that it *did* calculate, in order to reflect the impact of the credits. As a result, AT&T's USF pass-through charge has been and is greater than "the interstate telecommunications portion of [ESI's] bill times the relevant contribution factor,"[8] which violates the rule.

6. Neither AT&T's subaccount system nor ESI's separate credit subaccount required AT&T to violate the USF pass-through rule; neither forced AT&T to set its USF pass-through charge too high or prevented it from computing a pass-through charge that complies with Section 54.712(a). AT&T's system of subaccounts to display charges and credits for invoicing purposes does not somehow prevent AT&T from calculating an accurate USF pass-through charge. AT&T nevertheless failed to do so. ESI's complaint seeks relief from AT&T's decision (which was not ESI's decision) to calculate its USF pass-through charge without taking contract credits into account, despite the fact that AT&T is free and able to do so regardless of where credits may appear in its invoices.

7. AT&T argues that the "plain language" of the MSA precludes ESI's Complaint.[9] But nothing in the MSA blocks AT&T from complying with the USF pass-through rule. There is no provision requiring AT&T to ignore credits and charge an excessive USF pass-through charge. Indeed, the "plain language" of the contract requires the very opposite, consistent with the Commission's rule and the relief ESI

[8] 47 C.F.R. § 54.712(c).

[9] Legal Analysis at 11.

seeks in this Complaint. Section 1.1 of the MSA[10] specifically includes credits as part of the contract's "Rates and Charges":

> "Rates and Charges" means the rates and charges (*__including discounts and credits__*) for the Services, as modified from time to time as permitted under or required by the Agreement. Rates and Charges for all Services referred to or described in the Pricing Schedules shall be set forth in the Pricing Schedules. For Services or Service Elements that ESI chooses to use which are not specifically set forth in a Pricing Schedule, the Rates and Charges for such Services shall be those set forth in the applicable Tariff or Service Guide.

(Emphasis added.)

8. "Rates and Charges" do not include regulatory charges such as the USF pass-through charge. The MSA defines "Regulatory Charges" separately in Section 5.1(b) and Section 5.1(c) clearly states that "[t]he Regulatory Charges and Taxes *__are in addition to the Rates and Charges__* set forth in a Pricing Schedule, or if not in a Pricing Schedule, in the applicable Service Guide or Tariff."[11] (Emphasis added.) Section 5.1(b) clarifies that "examples of such charges include the primary interexchange carrier charge, *__federal universal service charges__* and compensation to payphone providers."[12] (Emphasis added.) By including credits in Rates and Charges and defining Regulatory Charges as fees "in addition to" Rates and Charges, the MSA requires AT&T to include the contract credits in its Rates and Charges which, as a matter of simple mathematics, requires Rates and Charges to be reduced before they can be used as a building block for the calculation of any Regulatory Charges.

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10 *See* Exhibit 4 of the Bereyso Declaration filed with AT&T's Answer at the page numbered "7." For convenience, citations to the MSA refer to the parties' 2011 MSA. Any differences between the language of the earlier MSA and the 2011 MSA will be noted in the text.

11 *Id.* at the page numbered "30."

12 *Id.*

9. But the MSA is another red herring in AT&T's support for its affirmative defenses. The MSA is simply irrelevant to the question of whether AT&T has violated the Commission's rule because those rules impose independent compliance duties on AT&T that it cannot contract away.[13] The MSA could expressly set ESI's USF pass-through charge ten times higher than the rule allows and AT&T would still be in violation of the rule if, in full compliance with the MSA, it charged more than the rule permits. Accordingly, the Commission does not have to reach any conclusions about the MSA or AT&T's invoicing format in order to conclude that AT&T's USF pass-through charge violates the rule. Again, AT&T is free to construct any billing system it chooses so long as the system results in a lawful USF pass-through charge.

10. AT&T also argues that its excessive USF pass-through charge is a dilemma of ESI's own making because AT&T (or ESI) could have orchestrated a *de facto* reduction in ESI's USF pass-through charges by putting the contract credits into a different subaccount/bill group, if a subaccount/bill group were big enough to absorb the credits, or by combining all of its charges, including credits, into a single subaccount. Because ESI did not do so, the "credit has nothing to offset."[14]

11. In fact, the credits do have something to offset and they do offset it; they offset ESI's total telecommunications charges, as shown on the Summary of Accounts section in ESI's bill.[15] Contrary to AT&T's claim, the credits are, in fact, "placed on a bill

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13 Contract provisions authorizing unlawful behavior are not enforceable. ***Cross reference to note in arb section re even if contract expressly authorized AT&T's practice (which it doesn't), can't trump FCC rules***.

14 Legal Analysis at 13.

15 *See* Gardner Declaration, Exhibit 3.

with interstate telecommunications charges,"[16] regardless of whether a customer uses a single subaccount or all 250 of the subaccounts that AT&T allows customers to use. Applying the credits to reduce the total amount due from ESI does not, however, undo AT&T's premature inflation of the USF pass-through charge early on in its invoicing process. Yet AT&T failed (and still fails) to base its USF pass-through calculation on those reduced charges, in violation of the pass-through rule.

12. AT&T also claims ESI used a separate subaccount for its credits because doing so somehow served ESI's "business purposes," as if some self-serving and alternative agenda were at work. AT&T states that ESI "knew that the full amount of the credit would be available to use for its own business purposes" even though "the credit would not offset any charges, including USF line-item charges, on any other bill."[17] As a result, "ESI retains the ability to use the full amount of the credit in whatever way it wishes."[18]

13. These claims are nonsensical and factually wrong: the credit is not available for other "business purposes" nor can ESI use it "in whatever way it wishes" because it can only be applied to ESI's **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** bill to reduce **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** charges. The credit is a credit against AT&T's charges for **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]**. That is the only "way" ESI can "use" the credit, as an offset to its **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END**

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[16] Legal Analysis at 13.

[17] *Id.* at 12; *citing* Veverka Declaration p.12.

[18] *Id.* at 11.

CONFIDENTIAL INFORMATION] bill. The credit is not a bag of cash or an Amazon gift card that ESI can use for other purposes or to purchase other products. And the credit *does in fact* offset the charges from the subaccounts/bill groups because AT&T applies it to reduce the total amount due on the Summary of Accounts page of the master account bill. The problem is that the reduction of the total amount due does not go far enough – it fails to undo AT&T's inflation of its USF pass-through charge earlier in the subaccount statements.[19]

14. Finally, AT&T argues that ESI is asking the Commission by way of relief to order substantial changes in AT&T's billing system, which "flies in the face of the parties' contractual bargain" and must therefore be denied so that the contract can be respected and enforced.[20] Specifically, AT&T claims that the Gardner Declaration espouses a specific methodology for correcting AT&T's excessive pass-through charges and that methodology conflicts with the contract.

15. But ESI is not asking the Commission to order any substantial changes in AT&T's billing system. As the Gardner Declaration emphasizes, there are any number

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19 AT&T's Legal Analysis makes the puzzling claim at n. 44 that the Summary of Accounts page of ESI's bill is "not a bill" so when AT&T fails to reduce its USF pass-through charges when it reduces the total amount due by applying ESI's credits on the Summary of Accounts page, that failure simply implements the Pricing Schedule's reference to "a single bill group" for credits. AT&T argues that, because USF pass-through charges appear as line items on the subaccount pages and do not appear as a separate line item on the Summary of Accounts page, there are no line items on the Summary of Accounts to which Section 54.712(a) can apply. This exercise in hair-splitting is inconsistent with the facts. The Summary of Accounts is one of the pages in ESI's bill from AT&T for its **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** services. As the Veverka Declaration points out at ¶ 8, the Summary of Accounts provides the "total amount due across all bill groups." A statement of the total amount due from a customer is a bill. ESI does not pay the intermediate amounts recorded on the subaccount pages of the invoice because those amounts do not reflect any contract credits. ESI pays the amount due on the Summary and that amount incorporates reductions from the application of contract credits. AT&T should have revised its USF pass-through charges to reflect the impact of those reductions on the "telecommunications portion of the customer's bill" that AT&T uses to compute the pass-through charge in order to be in compliance with the FCC's rule.

20 Legal Analysis at 14.

of ways for AT&T to bring its USF pass-through charge into compliance with the FCC's rules.[21] Contrary to the Veverka Declaration and assertions in AT&T Legal Analysis, the Gardner Declaration did not demand that AT&T abandon its subaccount/bill group system in order to calculate an accurate USF pass-through charge. AT&T's decision to calculate its USF pass-through charge using preliminary, pre-credit amounts from the subaccounts need not result in an unlawful USF pass-through charge. Nor would AT&T have to re-vamp its entire system, as AT&T suggests, in order to ensure that the system generates a lawful USF pass-through charge. As the Gardner Declaration points out, AT&T could change nothing in its billing system and solve its problem simply by adjusting the USF pass-through charge the way it already adjusts taxes on the Summary of Accounts page of its invoices.

16. +AT&T's choice of format for its invoices – giving customers the option of multiple bill groups and specifying the total amount due on the Summary of Accounts page – does not determine whether AT&T complied with 54.712(a). Nor do the FCC's rules dictate any particular billing system or invoice format. Nor is ESI asking that the FCC order any changes in AT&T's billing systems or invoice format. AT&T has complete flexibility to design whatever billing system and invoice format it prefers. But whatever system AT&T devises must result in charges that are consistent with the FCC's rules. AT&T cannot end run compliance with those rules by designing its billing system and invoice formats to calculate a higher USF surcharge payment than that permitted under the rules.

II. AT&T's Third Affirmative Defense: Arbitration and Venue Provisions

[21] Gardner Declaration at ¶ 11.

17. AT&T's third affirmative defense is that ESI's claims arise out of or relate to the MSA and the MSA requires ESI to pursue such claims only via arbitration. Once again, that defense fundamentally misunderstands the nature of ESI's complaint, which arises out of and relates solely to AT&T's violation of Section 54.712(a) of the Commission's rules.

18. The arbitration clause in the MSA is therefore inapplicable to this dispute since the clause only applies to disputes that arise out of or relate to the MSA. But even if the clause were applicable (which it is not), it would not require arbitration of this dispute. AT&T's discussion of this issue ignores the plain language of the MSA's arbitration provision which states that the provision does not apply to disputes involving the lawfulness of AT&T's rates, terms, conditions, or practices with respect to services that are subject to the Communications Act or the Commission's rules and regulations.[22]

19. As noted in the paragraphs above, this dispute concerns AT&T's violation of Sec. 54.712(a) of the Commission's rules, not the construction or interpretation of the MSA or any claim that either party is in breach of the MSA. The FCC does not need to make any findings whatsoever regarding the MSA in order to resolve this complaint because the provisions and requirements of the MSA are irrelevant to the question of whether AT&T violated Sec. 54.712(a) of the Commission's rules when it overbilled ESI for USF pass-through charges. Indeed, though the MSA is silent regarding Sec. 54.712(a) of the rules, even if the MSA affirmatively directed AT&T to collect a USF pass-through charge in excess of the amount allowed by the Commission (which the

22 2011 MSA § 17.7(c).

MSA does not do), that provision would be unenforceable under long-standing rules of contract law invalidating illegal contract provisions.[23]

20. But the Commission need not bog down in questions regarding what "arises out of" or "relates to" the MSA in order to reject AT&T's defense because, even if AT&T is correct (which it is not), the MSA nevertheless would not require arbitration. Instead, the MSA explicitly excludes disputes of this type from the arbitration provision and authorizes parties to seek relief from the Commission. The MSA's arbitration provision, which AT&T fails to quote in its entirety, provides as follows:

> The arbitration procedures set forth in Subsection (a) above shall not apply to Disputes relating to: (i) the lawfulness of rates, terms, conditions or practices concerning Services that are subject to the Communications Act of 1934, as amended, or the rules and regulations of the Federal Communications Commission or other Regulatory Authority; or (ii) non-compliance with Article 7 (Confidential Information) or Section 17.6 (Publicity and Marks) with provisions of the Agreement related to intellectual property, a violation of which would cause irreparable harm for which damages would be inadequate. As to disputes described in this Subsection (c), the claimant reserves the right to seek relief from an administrative agency or court of competent jurisdiction, as appropriate.

2011 MSA at 17.7(c) (emphasis added).[24]

21. AT&T claims that the carve-out for disputes involving the FCC's rules and regulations does not apply to this dispute because the carve-out does not apply if "ESI does not challenge any of the 'Services' that AT&T provides to ESI."[25] Although AT&T's reading of the carve-out language is not entirely clear (how would one challenge

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[23] AT&T cannot, by contract, immunize itself from liability for violating the FCC's rules. It is a long-standing tenet of contract jurisprudence that contract provisions which authorize or require unlawful behavior are void as against public policy and will not be enforced. *See* Restatement (Second) of Contracts § 178(1) (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.") *See also Kaiser Steel Corp. v. Mullins,* 455 U.S. 72 (1982).

[24] The MSA's 2007 predecessor contained the same provision at Section 19.7(b).

[25] Legal Analysis at 20.

"Services"?), its interpretation is nevertheless inconsistent with the plain words of the provision. The provision does not carve out challenges to services, whatever those might be. It carves out challenges to "the lawfulness of rates, terms, conditions or practices" regarding services. ESI's complaint does exactly that; it challenges the lawfulness under the Act and the Commission's regulations of AT&T's practice of inflating its USF pass-through charges for ESI's services above the dollar amount permitted under the Commission's rules (and, of course, the lawfulness of the resulting pass-through rates themselves). Because ESI's challenge therefore falls squarely within the exemption from arbitration established by the MSA, the MSA's arbitration provisions are irrelevant to this dispute and the dispute is properly before the Commission.[26]

III. AT&T's Fourth and Fifth Affirmative Defenses: Statutory and Contractual Limitations Period

22. AT&T argues that ESI's claim for damages is limited by the two-year limitations periods specified in the MSA and in Section 415(b) of the Communications Act, 47 U.S.C. § 415(b). Neither of these limitations periods bar any portion of ESI's claim. The limitations period in the MSA does not apply to this complaint because the basis for the complaint is AT&T's violation of the Commission's rules, not any right, remedy, or dispute arising under the contract to which the MSA's limitations period might apply. And the statutory limitations period does not bar any portion of ESI's claim

[26] AT&T's "venue" argument at n. 58 of its Legal Analysis fails for the same reason. The last sentence of Section 17.7(c) specifically authorizes claimants to seek relief from an administrative agency, not the court specified in the "venue" clause at Sec. 17.6 of the MSA, if the dispute falls within the carve-out.

because ESI filed its complaint within two years of discovering that AT&T's had violated the USF pass-through charge rule.

23. The limitations periods established by both the MSA and Section 415 begin to run from the time that a cause of action accrues. The applicable standard for determining when a cause of action accrues is the "discovery of injury rule."[27] Under the discovery of injury rule, a cause of action accrues (and the statute of limitations begins to run) when a customer discovers, or with due diligence should have discovered, the injury which forms the basis for her claim.

24. In this case, ESI did not discover that AT&T's USF pass-through charges violated the Commission's rules until February 18, 2015, when Julie Gardner of TechCaliber Consulting completed her analysis of ESI's invoices and informed ESI that AT&T's charges exceeded the amount permitted under Section 54.712(a).[28] ESI filed its complaint within two years of that date, after diligent investigation of Ms. Gardner's report and two attempts to settle the dispute with AT&T, so its claim is not time-barred.

25. AT&T argues that each invoice ESI received with unlawful pass-through charges constitutes a separate cause of action because "[i]t is black-letter law that 'the cause of action on each invoice accrued when that invoice' comes due."[29] Actually, the black-letter law is more complicated than that and requires a factual determination by the trier of fact regarding the nature of ESI's claim and whether it was readily discoverable from the invoices ESI received.

> As the U.S. Court of Appeals for the District of Columbia Circuit has explained, in a case concerning ILEC overcharges to carrier customers for access services:

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[27] *MCI Telecomm. Corp. v. FCC*, 59 F.3d 1407, 1416 (DC Cir 1995).

[28] *See* Julie Gardner's declaration accompanying this Reply ("Gardner Second Declaration") at ¶3.

[29] Legal Analysis at 27.

> [i]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. *But if… the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury*.[30]

The discovery rule, therefore, requires an assessment of two elements: "first, whether the objective facts should have put the plaintiff on notice of a potential claim; and, second, whether the inquiry made by the plaintiff was reasonable."[31]

26. The first element, sometimes referred to as "inquiry notice," is not present until a complainant

> possesses enough information that is 'sufficiently probative' of wrongdoing[;] that is, when the facts are 'advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated – not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit.'[32]

Determining whether a complainant has inquiry notice is a factual determination that requires consideration of all the relevant circumstances, including the nature of the customer and "the degree of their sophistication, the type of services ordered and the plaintiffs' reasonable expectations, and the presentation of the billing itself."[33]

27. In this case, ESI had no "inquiry notice" that AT&T's USF pass-through charges violated (and continue to violate) the Commission's rules. There were no "objective facts" that could "readily be discovered" from AT&T's invoices, the provisions of the MSA, the [**BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END**

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30 *MCI Telecomm. Corp. v. FCC*, 59 F.3d 1407, 1416 (DC Cir 1995) (emphasis added).

31 *Beattie v. CenturyTel, Inc.*, 673 F. Supp. 2d 553, 558 (E.D. MI 2009), *citing Wyser-Pratte Mgmt. Co. v. Telxon Corp.,* 413 F.3d 553, 563 n. 9 (6th Cir.2005) ("*Beattie*").

32 *Beattie* at 558 (citing Fujisawa Pharm. Co., Ltd. V. Kapoor, 115 F.3d 1332, 1553 (7th Cir. 1997)) (E.D. MI 2009).

33 *Id.*

CONFIDENTIAL INFORMATION] Pricing Schedule, or any communications between AT&T and ESI that would have put ESI on notice that a Commission rule on this point even existed, much less that AT&T was violating it. In short, ESI could know what dollar figures were on its invoices but it could not know that those amounts broke the law.

28. Moreover, ESI is a true "end user" of telecommunications services, not a carrier customer with detailed knowledge of the Commission's rules and powerful incentives to monitor those rules closely. Instead, ESI is more akin to the plaintiffs in *Beattie v. CenturyTel*, *Inc.*, who "acknowledged that they did not understand the charge on their bills, but that concession does not lead ineluctably to the conclusion that they should have known the billing 'practice ... [was] unjust or unreasonable' within the meaning of 47 U.S.C. § 201(b)."[34] Like AT&T in this case, the carrier in *Beattie*, CenturyTel, asked the court to hold as a matter of law that the plaintiffs' cause of action accrued each time the customer received a phone bill with an inadequate billing description and paid the bill, because the inadequacy of the service description on the invoices in that case put the customer on "inquiry notice" that the service charges at issue were questionable. But even CenturyTel conceded that "where a line item on a bill was clearly stated but false...a customer's failure to inquire could be found reasonable…because the biller's action would mislead the customer and prevent discovery."[35]

29. As the *Beattie* decision affirms, "inquiry notice" does not presume that ESI is as familiar with the Commission's rules as AT&T is supposed to be. "[T]he standard

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34 *Id.* at 559.

35 *Id.* at 557.

under the discovery rule requires only reasonableness, not paranoia. *See Heinrich v. Sweet,* 44 F.Supp.2d 408, 417 (D.Mass.1999) (stating that reasonable diligence does not require a plaintiff to 'scour medical journals ... after their loved ones die of terminal brain cancer' and explaining that discovery rule does not exist to 'encourage or reward simple paranoia') (citation omitted)."[36]

30. Indeed, under the notice standard, ESI was entitled to assume that AT&T was complying with the Commission's rules, including Section 54.712(a). "[A]bsent evidence to the contrary, the plaintiff is entitled to assume that the persons with whom he deals are not in default of their obligations to him."[37] In this case, ESI was entitled to assume that AT&T was in compliance with the Commission's rules because nothing on the face of its invoices, contract documents, or communications with AT&T indicated that AT&T's charges were unlawful.

31. Thus, AT&T's claim that a separate cause of action accrues each time a customer receives an invoice containing billing errors reflects a fundamental misunderstanding of the nature of ESI's complaint and the standard for determining when a cause of action accrues. Unlike the plaintiffs in routine billing error cases, ESI is not claiming to be the victim of a billing error that would be apparent on the face of the invoice, or would at least trigger due diligence by a reasonable customer. AT&T's invoices did not create actionable "inquiry notice," because the invoices contained no readily discoverable indication of AT&T's rule violations. Instead, ESI is a victim of AT&T's violations of this Commission's rules. It did not discover or have reason to

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[36] *Id.* at 558.

[37] *Sprint Communications Co. v. FCC,* 76 F.3d 1221, 1226 (1996).

discover the damages caused by those violations until it was informed of the violations in February of 2015, less than two years before it filed the instant complaint. Accordingly, none of its claims are time barred.

IV. Additional Defenses in AT&T's Legal Analysis

32. In Parts II.B and IV.B. of its Legal Analysis, AT&T raises two additional defenses that it does not cross-reference explicitly in the discussion of Affirmative Defenses in its Answer. Those arguments are addressed below.

33. Retroactive Damages Would Be a Manifest Injustice – In Section II.B. of its Legal Analysis, AT&T argues that it should not be ordered to pay "retroactive money damages" if the FCC determines that AT&T violated the Commission's rules because such a penalty would "work a manifest injustice."[38]

34. All damages are, by definition, "retroactive" so the backwards-looking nature of any legal remedy is not a valid basis for challenging it. In support of its argument, AT&T cites a number of cases that address the retroactive application of rules adopted in new rulemakings or retroactive liability for new policies adopted in the course of an adjudication, not the calculation of damages based on injuries pre-dating the filing of a claim.

35. Those cases are inapposite to the relief ESI seeks. ESI has not asked the Commission to impose a new rule or requirement upon AT&T in this case or to assess a fine or forfeiture on AT&T for violating rules that were unclear or did not apply at the time of the dispute. Rather, the rule at issue, Sec. 54.712(a), is detailed and clear, has been in place for many years, and has provided unambiguous notice to AT&T regarding

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[38] Legal Analysis at 17.

exactly what is required for compliance. Indeed, the rule sets out a simple mathematical formula for assessing compliance and gives carriers wide latitude regarding the rate levels and rate structures they may use to ensure that their USF pass-through charges satisfy the formula. A Commission finding in ESI's favor would not require, therefore, any retroactive imposition of new rules. It would merely hold AT&T accountable for its violation of an existing rule in the form of a routine damages determination.

36. The relief ESI seeks in its complaint would require AT&T to disgorge money to which it was not entitled and from which it has benefitted for several years. The only "manifest injustice" in this case stems from AT&T's overcharges to ESI in violation of unambiguous Commission rules. Damages that refund overpayments made by ESI, plus interest, undo that injustice and do no more than place AT&T in the position that it would have been in had it complied with the Commission's rules to begin with.

37. <u>Charges Not Subject to § 54.712(a)</u> - Part IV of AT&T's Legal Analysis contains AT&T's arguments in support of its fourth and fifth affirmative defenses which are based on contractual and statutory statutes of limitation. Those arguments are addressed above. Part IV.B. of that section also raises a slightly different argument.

38. AT&T claims that a "core limitation" of § 54.712(a) is that only the "interstate telecommunications" portion of a bill "is subject to the USF line-item charge" and therefore only that portion of a bill is "relevant to a damages calculation in this case." AT&T claims that ESI has conflated charges "assessable for purposes of calculating the USF line-item charges with charges that are not assessable." According to AT&T, credits based on ESI's purchase of non-telecommunications service do not

"reflect a reduction" in the telecommunications portion of ESI's bill because "those credits were not earned from the purchase of interstate telecommunications services." Therefore, AT&T maintains that only the portion of ESI's credits that were earned as a result of its spending on interstate telecommunications are relevant to the damages calculation.[39]

39. AT&T is correct that the MSA allows ESI to earn credits against its charges for **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** service by purchasing both telecommunications and non-telecommunications services from AT&T. The size of the credit applied to ESI's **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** charges varies according to the amount it spends on the services listed in the **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** Pricing Schedule at Section 4. AT&T is also correct that the Commission's USF contribution rules, including Section 54.712(a), apply only to "telecommunications" services, as that term is defined by the Communications Act.[40]

40. But AT&T is confusing the charges it counts in order to *size* the credit with the charges it reduces in order to *apply* the credit. Under ESI's **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** Pricing Schedule, AT&T counts all of ESI's spend on the services listed in Section 4, both telecommunications and non-telecommunications, to determine the dollar amount

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[39] Legal Analysis at 29-30.

[40] 47 U.S.C. § 153(50).

of the credit for which ESI qualifies.[41] But the credit itself is applied solely to ESI's charges for **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** service. Like a coupon for a discount on coffee when a customer buys a sandwich at full price, AT&T's credits reduce the price for ESI's telecommunications purchases when ESI buys other, non-telecommunications services. The credits are not applied to the bill for those non-telecom services and do not reduce the price for those other, non-telecommunications services. Instead, the entire amount of the credit reduces ESI's charges for **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** service. And **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** is a telecommunications service within the meaning of the Act.

41. Accordingly, AT&T's statement that credits for the purchase of non-telecommunications services do not "reflect a reduction in the 'interstate telecommunications portion' of" ESI's bill is simply wrong.[42] Credits based on ESI's purchase of non-telecommunications services do reduce the interstate telecommunications portion of ESI's bill. The Pricing Schedule requires AT&T to apply the full amount of those credits to ESI's charges for telecommunications and only telecommunications. The resulting reduction in ESI's telecommunications charges should have produced a corresponding reduction in ESI's USF pass-through charge. ESI's damages must therefore be based on 100% of the credit amounts set forth in the

[41] ESI's **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** Pricing Schedule is Exhibit 5 of the Bereyso Declaration.

[42] Legal Analysis at 30.

[BEGIN CONFIDENTIAL INFORMATION] [redacted] **[END CONFIDENTIAL INFORMATION]** Pricing Schedule.

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